In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 911

CHARLES P. LA PLACA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1965. The petition for a writ of certiorari was filed on January 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports petitioner's conviction for perjury.

2. Whether the district court properly refused to charge that petitioner's knowledge that his testimony was untrue (as distinguished from the objective falsity of his testimony) must be proved by two witnesses or one witness whose testimony is corroborated.

3. Whether the transcript of proceedings in another case, authenticated by the stenographer, was properly admitted in the instant case to show when certain events transpired.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of perjury and sentenced to imprisonment for four years. (R. 150.) The conviction was affirmed on appeal. (Pet. 7a.)

Petitioner, a bail bondsman, was a witness for the defense in the federal prosecution of Alfred Fagundes who was charged with having committed a bank robbery on September 5, 1963, at about 1:15 p.m. (R. 11-12, 21, 39, 44.) On the day of the bank robbery, cases in which petitioner had secured bail were pending against Fagundes in a State court in Cambridge (Pet. App. 2a.) Fagundes claimed presence in the Cambridge court at about the time the robbery was committed (R. 37-38). Petitioner's testimony placed Fagundes in the courthouse at 1:30 p.m. on Septem-

ber 5th in substantiation of Fagundes' alibi (R. 39-43).

At the federal trial, petitioner prefaced his account of the relevant events of September 5th with the statement that he remembered them "Very well" (R. 39). He testified that at 11 o'clock on the morning of September 5th he received word that Fagundes had been defaulted in the Cambridge court. He and Fagundes' attorney drove to Roxbury to look for Fagundes and then proceeded back to Cambridge. When court adjourned at one o'clock, petitioner testified, he mentioned to a police officer, Lieutenant Collins, that Fagundes was an escapee. Petitioner further testified that he then had lunch, returned to the courthouse, and at about 1:30, Fagundes walked in with his attorney. Petitioner entered the courtroom to await the judge. After the first case of the afternoon session was called, the attorney and Fagundes entered the courtroom (R. 39-42). On cross-examination, petitioner said that he placed the time of Fagundes' arrival between recess and the reconvening of the court (between 1 and 2 o'clock), and that Fagundes had come in about a half hour "before court started" (R. 42-43).

Petitioner was indicted for perjury for his testimony in the federal bank robbery prosecution. At petitioner's trial, the government introduced the testimony of the official stenographer for the Cambridge court, who read his transcript of the court's proceedings on the afternoon of September 5th. It showed that the afternoon session was called at 2:00 p.m. (R.

46). After a brief discussion of another case, Fagundes was defaulted (R. 48). At 2:20 p.m., the court commented on the time. Shortly thereafter, Fagundes' attorney reported that Fagundes had sent a message that he would appear in twenty minutes. A recess was taken and thereafter the default was removed (R. 49, 54).

The judge instructed the jury to consider the transcript only insofar as it may tend to show that, the first time the Fagundes case was called during the afternoon session, no one appeared (R. 62-63).

The testimony of the county attorney, who prosecuted the Cambridge court case, established that Fagundes was not present when the case was called shortly after the start of the afternoon session on September 5th (R. 64-65). When the judge presiding in the Cambridge court announced the time as 2:20, the attorney recalled that he verified it by the clock on the wall and his own watch (R. 65-67). The short recess which was taken after Fagundes' attorney addressed the court (in connection with the message from his client) occurred at 2:30 p.m. The county attorney returned to the courtroom at approximately ten minutes of three and saw Fagundes there for the first time (R. 66).

Lieutenant Collins testified that he was in the corridor outside the Cambridge court after 2 o'clock on September 5th. At about 2:30 p.m., petitioner came out of the courtroom and, in a conversation with Collins, petitioner said he had had "another one default just now." Collins asked who had defaulted and pe-

titioner replied that it was Fagundes.[1] Petitioner asked Collins to watch for a man named John Happnie. Collins wrote down the names of both Fagundes and Happnie (R. 75-78). At about 2:45 p.m., Collins saw Fagundes come up the steps and go into the courtroom (R. 79).

In his instructions to the jury, the judge charged, *inter alia*, that the falsity of petitioner's testimony had to be proved by at least one witness and corroborated by other testimony or documentary evidence (R. 133-134). The judge refused defendant's request to charge that the government "is required to prove beyond a reasonable doubt that the defendant knew his testimony was untrue when given and such knowledge must be proved by the sworn testimony of two witnesses, or of one witness whose testimony is corroborated or supported by the other evidence in the case" (R. 140-141).

ARGUMENT

The decision below is correct and the petition presents no question warranting review by this Court.

1. Petitioner's attack on the sufficiency of the evidence (Pet. 10-15) is without merit. He argues, in essence, that he judged the time of Fagundes' appearance by the court's recess which he assumed to be the normal one from 1:00 p.m. to 2:00 p.m. (dividing the morning and afternoon sessions), but which he might reasonably have confused with the special recess

[1] Petitioner's testimony had put the time of his conversation with Collins at 1:00 p.m.

taken from 2:30 p.m. to 2:50 p.m. (during which Fagundes appeared) (Pet. 10-11, 15). However, petitioner's testimony at the Fagundes bank robbery prosecution provides no basis for the contention that he made such an innocent mistake. He was very careful to connect his activities with the lunch-hour recess. He testified that he had attempted to find Fagundes at Roxbury; he then drove back to Cambridge; he had a conversation with Collins lasting five to seven minutes (R. 39); thereafter, he had lunch in five to ten minutes (R. 39); and he returned to the courthouse where, prior to entering the courtroom, he claimed to have seen Fagundes. Petitioner could not have believed he accomplished all that during the special recess in the twenty-minute period between 2:30 p.m. and 2:50 p.m. Petitioner testified that he had seen Fagundes approximately one-half hour before the court resumed (R. 43). It would also have been impossible for that meeting to have occurred during the short special recess. The jury was explicitly instructed that petitioner could not be convicted for an "innocent error", no matter how great (R. 134), and that petitioner had no duty, as a witness, to check the facts before he was called to testify (R. 133). The jury nevertheless found petitioner guilty on evidence which amply supports the conclusion that petitioner deliberately gave false testimony.

Petitioner also asserts that Lieutenant Collins must have been mistaken as to the time of their conversation as there was no reason to ask Collins to look for Fagundes after 2:30, when word had been received that Fagundes would appear in court (Pet. 8,

fn. 2, 14). But Collins did not testify that petitioner asked him to look for Fagundes. Petitioner said that Fagundes had just defaulted and, thereafter, asked Collins to look out for Happnie (R. 77-78). The fact that petitioner specifically asked Collins' assistance with respect to Happnie suggests that petitioner did then expect Fagundes to appear.[2]

2. Similarly unsound is petitioner's view that the "two witness rule" ought to be applied not only to prove the objective falsity of testimony, but "to the myriad other facts from which, in any given case, the inference of subjective falsity may be drawn" (Pet. 17). Since intent is necessarily found by inference from the circumstances in a case, it would follow from petitioner's reading of the law that all evidence used to corroborate the falsity of a statement would itself have to be corroborated. It would create an impossible burden making the requisite intent "never provable". Cf. *Cramer* v. *United States*, 325 U.S. 1, 31. The "two witness" rule merely recognizes that "equally honest witnesses may well have differing recollections of the same *event*"; and it therefore prevents harassment of an innocent witness by requiring something more than the "oath" of one other witness to sustain a perjury conviction. See *Weiler* v. *United States*, 323 U.S. 606, 609 (emphasis added). That purpose is fully served by the tra-

[2] Petitioner's bemoaning of Fagundes' default may have led *Collins* to believe that he ought to watch for Fagundes. Nevertheless, petitioner's request was made solely as to Happnie.

ditional requirement of a stringent quantum of proof to demonstrate objective falsity. To extend the doctrine to the showing of a witness' mental state would destroy the benefits to the judicial process of the criminal sanction for perjury. See *United States* v. *Magin*, 280 F. 2d 74 (C.A. 7), certiorari denied, 364 U.S. 914; *Young* v. *United States*, 212 F. 2d 236 (C.A.D.C.), certiorari denied, 347 U.S. 1015.[3]

3. The trial judge did not err by allowing in evidence the transcript of the Cambridge court. He limited its use to its possible relevance in establishing that the Fagundes case was first called in the afternoon session. Indeed, the judge's restrictive ruling was overly circumspect for the transcript would have been admissible to prove the times noted therein. As pointed out by the court of appeals (Pet. App. 6a), statements serving to mark a time or place are admissible so far as they are relevant to that purpose. See Wigmore, *Evidence* (3rd ed.), Sections 418, 1791.

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[3] Even where the Constitution provides that overt acts of treason be proved by two witnesses, "It seems obvious that adherence to the enemy, in the sense of a disloyal state of mind, cannot be, and is not required to be, proved by deposition of two witnesses." *Cramer* v. *United States*, *supra*, at 31. See, also, *Haupt* v. *United States*, 330 U.S. 631.

Petitioner relies on *United States* v. *Remington*, 191 F. 2d 246 (C.A. 2), certiorari denied, 343 U.S. 907. In that case, the perjury charged was a false statement as to membership in the Communist party. It was held that the acts from which membership could be inferred must be specified, and that the jury must be instructed that such acts be proved in accordance with the perjury rule.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1966.

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